STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2006
v	No. 263347 Wayne Circuit Court
THELONIOUS DESHANE-EAR SEARCY, Defendant-Appellant.	LC No. 04-012890-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to life in prison without parole for the first-degree murder conviction and to fifteen to thirty years in prison for the assault with intent to murder conviction, with the sentences to be served concurrently with each other and consecutively to a sentence of two years in prison for the felony-firearm conviction. We affirm.

Defendant contends that the trial court committed an error requiring reversal by administering oaths to the jurors in an improper order. He also claims that his trial attorney was ineffective for failing to notice and object to the error. These arguments are without merit. Indeed, while the "improper order of oaths" that defendant refers to is reflected in the original trial transcript, the court reporter filed an amended transcript demonstrating that the oaths were read in the proper order. Accordingly, there is no factual basis for defendant's arguments, and a reversal is unwarranted.

Defendant next argues that the trial court committed an error requiring reversal when it allowed the prosecutor to introduce evidence of ballistics testing that was completed after the trial began. We review a trial court's decision whether to admit evidence, including late-discovered evidence, for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003); *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). In deciding whether to admit late-discovered evidence, a court should balance the dual goals of discovery, which are to enhance the fairness of the adversary system and to ensure that judgments are based on a full presentation of the facts. *People v Burwick*, 450 Mich 281, 296-297; 537 NW2d 813 (1995). The preclusion of evidence is an extreme sanction reserved only for particularly egregious cases. *Id.* at 294; *Callon, supra* at 328. Generally, a continuance is the remedy of

choice if it affords the defendant an adequate opportunity to address the new evidence. See *Burwick, supra* at 298. Finally, a trial court generally may not be said to have abused its discretion by admitting late-discovered evidence unless a defendant can show that he was prejudiced by the decision. *Id.* at 295; *Callon, supra* at 328.

Here, a ballistics comparison revealed that a gun seized at the time of defendant's arrest discharged the .45 caliber casings found at the scene of the shootings for which defendant was convicted. The comparison test was not performed, however, until the first day of trial. Little explanation was provided for the tardiness of the test, and defendant does not cite bad faith on the part of the police. Defendant objected to the admission of the comparison, asserting surprise. The court acknowledged that the evidence was tardy but stated that, given the seriousness of the charges, the court would not exclude the evidence because it was important to the prosecutor's case. The court offered defendant the opportunity to secure a rebuttal expert and to present additional witnesses. Defense counsel decided not to exercise either option and did not request a continuance.

Defendant argues that even a continuance could not have cured the prejudice that resulted from the admission of the evidence. First, he claims that he had no opportunity during voir dire to gauge whether prospective jurors would automatically assume that defendant was guilty because he was arrested in close proximity to a gun that was linked to the shooting. The trial court clearly stated before voir dire began, however, that the ballistics testing was in the process of being conducted. Therefore, defense counsel could have requested a continuance *at that time*, but did not do so. Moreover, defendant simply has not demonstrated that he was prejudiced as a result of the allegedly inadequate voir dire questioning.

Second, defendant claims that his attorney's inability to address the ballistics match in his opening statement "likely created the impression that [he] had no answer to such evidence and embarrassed the defense no matter what argument defense trial counsel subsequently made." However, it is difficult to conclude that this situation created significant prejudice, given that the jury was aware that the testing did not occur until after trial began. Moreover, during his closing statement, defense counsel stressed the prosecutor's "audacity" in presenting such late evidence; he added this argument to his theory that defendant was framed. In addition, not only was the prosecutor similarly unable to address the ballistics match during *his* opening statement, but the court prohibited both parties from even mentioning the discovery of the gun during their opening statements, in an attempt to enhance fairness.

Finally, defendant argues that he had no opportunity to make an effective choice of trial strategy by concentrating on separating defendant from the gun rather than merely by presenting an alibi and attacking the credibility of the eyewitnesses. There is no question that the ballistics evidence greatly enhanced the significance of the gun. Nonetheless, defendant offers little argument for how his trial strategy would have differed if he had known about the match before trial. The *Burwick* Court explicitly concluded that the lack of an argument regarding how the trial could have proceeded differently is relevant to the question of whether a defendant was prejudiced by the introduction of late-discovered evidence. *Burwick, supra* at 295. The fact that the gun matched the caliber of the casings in question was known before trial and already required defendant, albeit to a lesser extent, to separate himself from the gun. Moreover, the defense was offered time to secure an expert and to present additional witnesses. Regardless, counsel declined and, instead, appeared to reasonably use cross-examination techniques and

existing witnesses to address the ballistics match and the origin of the gun. Defendant's mother and grandmother testified that defendant was not actually living in the apartment where he was arrested. The grandmother also testified that the gun did not belong to defendant but was left in the apartment by another man. Defendant does not suggest what testimony or other evidence would have further distanced him from the gun or why he would not have investigated such evidence from the outset.

The ballistics evidence was clearly important to a jury's full understanding of the facts of the case. Defendant failed to request a continuance and presents a near total lack of argument for how the trial would have differed if the ballistics evidence had been received earlier or if the trial had been postponed. Thus, a reversal is unwarranted.

Defendant lastly argues that he is entitled to a new trial, or at least a remand for an evidentiary hearing, based on newly discovered evidence. He contends that a prosecution witness, Latasha Boatright, provided perjured testimony when she testified that she was "a friend" of DeAnthony Witcher, the intended victim in this case.[1] Defendant indicates that Boatright and Witcher were not "friends" but rather were half-siblings. Defendant argues that "[t]here is a real likelihood that the jury would have discounted Boatright's testimony, knowing that Boatright was Witcher's half-sister with a possible motive to falsely accuse [defendant] out of spite." We disagree that a reversal or a remand is warranted.

As stated in *People v Miller*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995), "[b]efore a new trial is warranted" on the basis of newly discovered evidence, "a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence." Here, evidence that Boatright was Witcher's half-sister would *not* have been likely to cause a different result, given that Boatright already demonstrated a possible bias by testifying that Witcher was her friend. Moreover, the alleged fact that Boatright was Witcher's half-sister does not necessarily render untrue the statement that Boatright was also his friend. Accordingly, a reversal or remand is unwarranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

[1] Different individuals ended up being shot, apparently in a case of mistaken identity.